

YOUR NEIGHBOR DID WHAT? PUBLIC REGULATION VS. PRIVATE LAND USE RESTRICTIONS

Firm Newsletter

Published: 12.28.2010

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Suppose that your neighbor, much to your dismay, builds a detached garage four feet from your property line. While the garage violates your neighborly sensibilities, you think it might also violate your neighborhood rules and applicable zoning requirements. After a decidedly un-neighborly discussion with your neighbor, where do you turn for resolution? In today's residential property landscape (which includes record foreclosures, developer bankruptcies, short-sale buyers with differing agendas and a variety of other unusual circumstances), some effort may be required to identify and consider the preferred enforcement authority to address these types of situations. The first step, however, is to understand the scope of authority for local zoning boards and property owner associations to address these situations when they arise.

Zoning Ordinances

Zoning ordinances were developed by local government to promote appropriate and compatible development of real estate, and customarily require transition areas between uses of greater and lesser intensity (e.g., commercial and residential uses), particularly when such uses are in close proximity. Properties are categorized by use (residential, industrial, retail/commercial, etc.), and are sub-categorized to more specifically identify permitted uses and other development requirements within the larger categories. Examples would include requirements for minimum lot sizes, permitted improvements and other development features that local government may desire to create a community development standard.

Zoning ordinances and their associated requirements are enforced by the unit of local government that created the ordinance. The existence of zoning violations may be discovered from a variety of sources, including complaints received from individuals and zoning compliance reviews by enforcement staff. If the zoning enforcement authority issues a notice of violation to a property owner, the owner of the subject property may: (i) bring the property into compliance; (ii) apply for a variance to allow the non-conforming use to continue; or (iii) argue that the property is either in compliance or need not comply for other reasons (e.g., a "grandfathered" or pre-existing use). If the property is subject to ordinance requirements and the owner thereafter fails to timely bring the property into compliance (or obtain the required variance), the local government may order removal of the violation (or the entire structure), and may impose monetary penalties which may accrue daily until the violation is cured.

Covenants, Conditions & Restrictions

Unlike zoning ordinances, covenants, conditions and restrictions (Covenants) are imposed upon property by private contract, typically by the developer. The basic purpose of Covenants is to preserve and enhance value for the benefit of the developer and future owners and/or tenants of the subject property. In the residential subdivision context, Covenants help homeowners maintain subdivision development standards that meet their

original expectations when they purchased a home. Covenants are customarily recorded against a subdivision prior to sale of the first lot, and often before roads, utility improvements and other infrastructure are complete. Residential Covenants usually also incorporate architectural review boards to assure that proposed construction complies with provisions of the Covenants relating to square footage, architectural and design requirements, approved building materials, outbuildings, fencing, landscaping and other aesthetic concerns, while also addressing development standards such as setback requirements for improvements constructed on property subject to the Covenants.

Enforcement of Covenants is typically undertaken by the subdivision developer or homeowners association or, if permitted by the Covenants or applicable law, by legal action of one property owner against another (whether under the Covenants or as a nuisance or similar action). The manner of enforcement is governed by the specific terms of the Covenants. Typical enforcement provisions require notice to the non-compliant owner specifying the nature of the violation and a deadline to cure. If the violation is not remedied prior to the cure deadline, then the association (or the aggrieved property owner, if permitted) may file a lawsuit to compel compliance. The association may, under certain circumstances, also be permitted to enter upon the subject property to cure the violation and assess the owner for the costs to effect such cure.

Shared Enforcement Authority

Zoning ordinances and Covenants seek similar goals of appropriate, compatible, consistent and regulated development. While Covenants may be drafted in a manner that exceeds applicable zoning requirements and associated restrictions, both Covenants and zoning requirements create legal obligations for property owners. For example, while the local zoning ordinance may allow for detached garages in the subject property's zoning designation, the Covenants may specifically prohibit auxiliary buildings. Where auxiliary buildings are permitted under both the ordinance and covenants, one or both of them may create additional development standards for both the location of the garage and its associated construction requirements.

In our garage example, the offended property owner (or his attorney) should review the Covenants to determine if the developer secured a variance from setback requirements for the subdivision or the subject property. If no variance was obtained, the zoning department may be the preferred enforcement authority (even if the garage also violates the Covenants), since the department will probably be more responsive than an underfunded homeowner association. Since the garage probably violates both applicable zoning and the Covenants, the garage builder would need to cure both the zoning violation and the breach of the Covenants. Resolving one does not necessarily resolve the other, and curing the Covenant violation may require an amendment of the Covenant, which may be difficult since consent of the Review Board and/or a significant percentage of subdivision property owners may be necessary to effect an amendment.

While a review of both the zoning ordinance and the Covenants would be necessary to determine which enforcement authority is most appropriate (and most likely to create resolution satisfactory to the aggrieved property owner), if the matter cannot be resolved privately among the property owners and the homeowner association, a call to the zoning department (and subsequent issuance of a violation) will often generate the desired reaction from the offending property owner.

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